



**Commentary on Sky's Response to Ofcom's Review of Sky's Access Control  
Regulation**

**18 November 2014**

**NON-CONFIDENTIAL VERSION**

**1. INTRODUCTION**

1.1 In this commentary on Sky's response<sup>1</sup> to Ofcom's second review of Sky's access control regulation, BT (i) briefly outlines certain key arguments that Sky has made in Sky's Second Response and (ii) explains why those arguments are not valid. It is clear that there remains an overwhelming case for new access conditions.

**2. THERE IS DEMAND FOR EXISTING AND FUTURE ENHANCED TV SERVICES**

**BT's plans to use existing enhanced TV services**

BT's plans for using existing enhanced TV services on the digital satellite platform

2.1 In its responses to Ofcom's first and second consultations on access control,<sup>2</sup> BT explained in detail that access to Sky's AC services were necessary in order to:

(i) [CONFIDENTIAL].

(ii) [CONFIDENTIAL]

(iii) [CONFIDENTIAL]

2.2 In BT's Second Response, BT provided an update on its plans and timings for the delivery of a red button service on Sky's platform. [CONFIDENTIAL]<sup>3</sup> [CONFIDENTIAL]<sup>4</sup>, [CONFIDENTIAL]

2.3. As a result, [CONFIDENTIAL]<sup>5</sup> [CONFIDENTIAL]

2.4. [CONFIDENTIAL], BT intends to use:

(i) [CONFIDENTIAL]

(ii) [CONFIDENTIAL]

(iii) [CONFIDENTIAL]<sup>6</sup>

(iv) [CONFIDENTIAL]

2.5. BT has [CONFIDENTIAL]<sup>7</sup>

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<sup>1</sup> Sky's Second Response (September 2014).

<sup>2</sup> BT's First Response (September 2013) and BT's Second Response (September 2014), respectively.

<sup>3</sup> [CONFIDENTIAL]

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<sup>5</sup> [CONFIDENTIAL]

<sup>6</sup> [CONFIDENTIAL]

<sup>7</sup> [CONFIDENTIAL]

- 2.6. In contrast to the Sky platform, where Sky has the ability and incentive to restrict access to Sky's AC services in order to impede BT in its deployment of red button services, on its own BT TV platform and on YouView BT is unhampered in its ability to maximise the capability of the BT Sport proposition. [CONFIDENTIAL]
- 2.7. BT is already using the pint-glass commercial watermark to protect its commercial channels on regulated terms under the existing access control continuation notices. BT explained in detail in its responses to Ofcom's first and second consultations why it is necessary to use the pint glass commercial watermark to protect its commercial channels, and why alternatives proposed by Sky are insufficient. Since BT is already using this service on regulated terms, it is clear that Sky's latest arguments that Ofcom is not legally entitled to require the provision of commercial watermarking have no merit – under the current AC regime, Sky has facilitated the use of the commercial watermark in conjunction with third party sports channels on its satellite platform for 10 years.
- 2.8. In BT's Second Response, BT explained that [CONFIDENTIAL]

Sky's comments on BT's evidence regarding the necessity of red button for clash management are misleading and wrong

- 2.10. BT explained in detail in its responses to both Ofcom's first and second consultation documents why access to red button services on Sky's platform [CONFIDENTIAL]. In Sky's Second Response, Sky deliberately misrepresents BT's evidence on this point, in an attempt to downplay the relevance and veracity of BT's evidence.
- 2.11. BT notes Sky's focus on FAPL content and the fact that there are only a limited number of FAPL games broadcast at the same time in a given season<sup>8</sup>. However, this is a deliberately obtuse assessment of BT's evidence. [CONFIDENTIAL]<sup>9</sup> [CONFIDENTIAL]
- 2.12. To build a successful sports channel requires more than FAPL content, a fact that Sky itself highlights continually. For instance in a recent press release entitled 'Sky Sports shows more sport than ever before' Mr Barney Francis states "*We are offering more sport, more choice and more reasons to watch Sky Sports than ever before. Our viewers can enjoy unrivalled sport across six channels, on mobile and digital platforms and while 2013 was the best year yet, we're sure 2014 will be even better.*"<sup>10</sup> Of the most televised sports listed in the press release, football makes up 8,462 hours of coverage whilst golf, cricket, F1, rugby union, tennis, rugby League and boxing combined amount to over 19,000 hours of coverage. Sky's press release accompanying its results for the nine months ended 31 March 2014 states: "*We have continued to strengthen the breadth and quality of our sports offering. Away from football, audiences to the start of the Super League season were up almost 30%. We have agreed 17 sports rights deals so far this year including the US Masters, IPL cricket and European rugby.*"<sup>11</sup>

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<sup>8</sup> Typically only on the last day of the season.

<sup>9</sup> Sky's Second Response paragraph 7.43.

<sup>10</sup> <http://corporate.sky.com/media-centre/news-page/2014/sky-sports-shows-more-sport-than-ever-before>

<sup>11</sup> <http://corporate.sky.com/documents/investors/results/q3-1314-press-release.pdf>

- 2.13. While there is no need to have red button capabilities in order for BT to broadcast its acquired FAPL matches, [CONFIDENTIAL]<sup>12</sup> BT notes Sky's attempts at reinterpreting BT's evidence on this point.<sup>13</sup> However, neither of Sky's interpretations are correct. BT's point is that [CONFIDENTIAL]<sup>14</sup>
- 2.14. BT also notes Sky's arguments that issues relating to clashes due to the accumulation of rights affect only "the fourth most attractive event occurring at a particular time to which BT has rights."<sup>15</sup> As BT highlighted in BT's First Response a key issue for clash management is [CONFIDENTIAL]<sup>16</sup>
- 2.15. In BT's Second Response, it highlighted one important area where direct, 'within rights', clashes were certain to occur –
- (i) Sky alleges that BT's "characterisation of the process by which sports rights auctions are auctioned is erroneous"<sup>17</sup> on the basis that "If broadcasters' financial bids for rights are evenly matched during the sales process the normal outcome is that the rights owner will continue the auction or negotiation process until one broadcaster offers sufficiently more than the other. That is certainly the case in relation to the types of key rights cited by Ofcom, namely Premier League and Champions League rights"<sup>18</sup> [CONFIDENTIAL] Moreover, it was widely reported that Sky sought to outbid BT after bidding closed<sup>19</sup>. [CONFIDENTIAL]<sup>20</sup>
  - (ii) [CONFIDENTIAL]
  - (iii) [CONFIDENTIAL]<sup>21</sup> [CONFIDENTIAL]<sup>22</sup> [CONFIDENTIAL]<sup>23</sup> [CONFIDENTIAL]
  - (iv) Equally, Sky claims that "rights owners are unlikely to view access to their events via interactive services as comprising valuable "exposure""<sup>24</sup>, and that " , if a rights

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<sup>12</sup> As previously explained in BT's Second Response, [CONFIDENTIAL]

<sup>13</sup> Sky's Second Response, paragraphs 7.31 to 7.38.

<sup>14</sup> See Section 3 below for a discussion of Sky's interpretation of the relevant threshold for intervention.

<sup>15</sup> Sky's Second Response paragraph 7.34.

<sup>16</sup> [CONFIDENTIAL]

<sup>17</sup> Sky's Second Response paragraph 7.43.

<sup>18</sup> Sky's Second Response paragraph 7.50.

<sup>19</sup> 'Football's new player BT changes the rules' (12 November 2013) <http://www.independent.co.uk/news/business/news/footballs-new-player-bt-changes-the-rules-8933666.html>, 'Gavin Patterson: the man behind BT Sport's Champions League raid' (11 November 2013): <http://www.theguardian.com/media/2013/nov/11/gavin-patterson-bt-sport-champions-league>.

<sup>20</sup> Moreover, if rights holders were solely interested in the level of financial bids achievable you would expect to see rights holders holding open tenders and detailed negotiations with both Sky and BT before renewing their rights. [CONFIDENTIAL]

<sup>21</sup> [CONFIDENTIAL]

<sup>22</sup> [CONFIDENTIAL]

<sup>23</sup> In this regard, [CONFIDENTIAL]

*owner has a preference for a high degree of exposure of its events, that rights owner would be extremely unhappy if a bidder intended to make a significant number of its events available via an interactive application. Their key interest is in having their events broadcast on a linear television channel, listed in an EPG.”<sup>25</sup> [CONFIDENTIAL]*

- (v) Finally, despite highlighting other alternatives that it claims BT could use to address clash management, these same alternatives are open to Sky, yet it is notable that Sky itself uses red button functionality to address UEFA clashes and has always done so.

2.16. Finally, BT notes Sky’s assertion that:

[CONFIDENTIAL]<sup>26</sup>

2.17. Firstly, Ofcom’s first consultation sought evidence on demand for Sky’s AC services. As such, it is unsurprising that BT’s evidence in BT’s First Response focused on the issues pertaining to Ofcom’s consultation. [CONFIDENTIAL] BT set out its views on this issue in detail in response to Ofcom’s second consultation document, and elaborates further on these points in Section 3 below.

#### **BT’s plans to offer future enhanced TV services over Sky’s new set top boxes**

2.18. As BT has highlighted in all of its responses and discussions with Ofcom to date, a critical deficiency in Sky’s proposed commitments is the fact that they do not cover access to AC services for new enhanced TV services over new generations of set-top-boxes. [CONFIDENTIAL]

2.19. Given the deficiencies associated with using a dial up modem and narrowband return path, which is largely limited to text and static images, it is unsurprising that there has been limited development of ‘new’ AC services in recent years. Anything that is likely to provide a benefit to consumers and is capable of being delivered via a dial up modem and narrowband return path has already been developed since the dial up modem/narrowband return path has been available for many years [CONFIDENTIAL]. As such, if Ofcom limits itself to a consideration of demand for existing AC services, and considers Sky’s commitments on that basis, it will miss the fact that demand for AC services for new enhanced TV services - which, by definition, cannot be ‘proven’ – will be critical.

2.20. Even without certainty as to the exact specification of Sky’s new set top boxes. [CONFIDENTIAL]<sup>27</sup>.

2.21. In this regard, [CONFIDENTIAL]<sup>28</sup> [CONFIDENTIAL]

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<sup>24</sup> Sky’s Second Response, paragraph 7.43 amongst others. [CONFIDENTIAL].

<sup>25</sup> [CONFIDENTIAL]

<sup>26</sup> Sky’s Second Response, paragraph 7.59.

<sup>27</sup> BT has previously noted, as a result, limited demand for these services today or the use of sub-optimal work-arounds due to the limitations inherent in using a dial-up modem and narrowband return path, cannot lead to a conclusion that demand for these services via the Sky set-top box is low.

2.22. [CONFIDENTIAL]

### 3. THE NATURE OF THE COMPETITION PROBLEM

#### **Sky's incentives as a broadcaster will dominate its platform incentives**

3.1. In terms of the specific competition concern in this case, the key issue is whether, at the margin, Sky has both the incentive and ability to raise its rivals' costs and/or make it more difficult for a downstream broadcaster and/or pay TV retailer to compete with Sky's own broadcast and pay TV retail businesses. It is clear that it does. BT addressed this issue at length in BT's Second Response.<sup>29</sup> Specifically BT explained that:

- (i) Sky's digital satellite platform remains an essential means of delivering multi-channel TV services and pay TV services given its overall scale. Sky now has 10.7 million subscribers,<sup>30</sup> which equates to two-thirds of total UK retail pay TV subscribers.<sup>31</sup> Therefore, two-thirds of UK pay TV subscribers use Sky set-top boxes as their primary (and often only) means of accessing pay TV services. Given both the absolute and relative scale of the Sky platform, access to these subscribers is critical for any pay TV provider seeking to build scale to recover the fixed costs associated with investment in pay TV channels.
- (ii) Sky's platform is a critical gateway to accessing premium pay TV subscribers, since it has the highest concentration of both premium sports and premium movies subscribers. Since the highest concentration of subscribers with the highest propensity to pay for premium sports channels is present on the Sky platform, launching a successful premium sports channel in practice requires access to Sky's subscriber base. Indeed, in Sky's Second Response, Sky itself states that "*Given the prominence of sports to Sky's brand and consumer proposition, a significant number of households on Sky's platform have a strong interest in sport. (This includes both subscribers to Sky's sports channels, and those that do not subscribe to those channels.)*"<sup>32</sup>
- (iii) As Ofcom correctly recognised enhanced TV services "*supplement and augment*"<sup>33</sup> and form "*an integral part of the viewer experience*". [CONFIDENTIAL]
- (iv) Any impact on BT's ability to build its subscriber base will further exacerbate the barriers to acquiring premium sports rights that Ofcom identified in its pay TV

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<sup>28</sup> [CONFIDENTIAL].

<sup>29</sup> See Section 1 and Section 2 of BT's Second Response for greater detail.

<sup>30</sup> Sky's Annual Report, 2013/14, includes subscribers in the UK and the Republic of Ireland.

<sup>31</sup> AC Consultation Document, paragraph 2.7.

<sup>32</sup> Sky's Second Response paragraph 6.35.

<sup>33</sup> AC Consultation Document, paragraph 7.14.

Statement in 2010.<sup>34</sup> [CONFIDENTIAL]<sup>35</sup> [CONFIDENTIAL]<sup>36</sup> [CONFIDENTIAL]<sup>37</sup>  
[CONFIDENTIAL]

- (v) Given that enhanced TV services are integrally linked to the underlying linear channel broadcast, any alternative which takes the viewer away from the linear channel environment on the Sky platform in order to access these enhancements, unless seamless and directly connected, will lead to a diminution in the viewer's experience. This leads (at best) to a risk of diminished quality perception of the channel and (at worst) the viewer not accessing the enhanced service at all. For these reasons second screen devices, additional EPG listings, APIs via smart TVs and linear TV, newspapers, radios or the internet are not substitutes for enhanced TV services delivered in conjunction with the digital satellite broadcast channel on Sky's platform.
- (vi) As such, access to Sky's 10.7 million subscribers via the Sky platform is critical for BT Sport, and the ability to use AC services to ensure that BT can bid for and exploit important sports rights, as well as ensure the quality of its sports channels, is essential. Gateway control of access control services, in light of the scale bottleneck that is the Sky platform<sup>38</sup>, combined with Sky's vertical integration gives Sky the ability to distort competition at the margin. [CONFIDENTIAL]
- (vii) As Ofcom has previously recognised, Sky is dominant in the wholesaling and retailing of Core Premium Sports Channels (notably the Sky Sports 1 and 2 channels), and makes super-normal profits on the sale of these channels.<sup>39</sup> The upside to Sky from protecting this market position for the long term is likely to provide a vastly stronger incentive than any downside from subscribers to its platform receiving a lower quality version of BT Sport via digital satellite in the short term. Given the relatively limited importance of the BT Sport channels to Sky's subscribers, Sky would be aware that a lower quality version of these channels on its platform would be unlikely to lead to its pay TV subscribers churning away to a different platform. [CONFIDENTIAL]<sup>40</sup> [CONFIDENTIAL]

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<sup>34</sup> See Appendix I and II to the Compass Lexecon paper titled "*Modelling dynamic competition in the retail CPSC market: indirect monetisation*" in Case CW/01106/05/13 - Complaint to Ofcom by BT regarding Sky's abuse of dominance.

<sup>35</sup> Sky's Second Response paragraph 7.7.

<sup>36</sup> Sky's Second Response paragraph 7.15.

<sup>37</sup> In the period January to March 2014, Sky agreed 17 sports rights deals. <http://corporate.sky.com/documents/investors/results/q3-1314-press-release.pdf>

<sup>38</sup> The scale bottleneck controlled by Sky provides access to more than three times the number of subscribers available via the next largest platform (Virgin Media – which is only present in around 50% of the UK) and over ten times the subscribers available via BT's YouView platform.

<sup>39</sup> See Ofcom's 2010 Pay TV Statement.

<sup>40</sup> In this context, it is important to note the asymmetry of the effect of Sky's withholding of AC services (i.e. by exploiting the flexibility afforded to Sky if not subject to regulatory conditions by watering down, or

- (viii) Sky's argument that these incentives would be checked due to "*intense competition at the retail level*" and "*strong downstream inter-platform competition*" is simply untenable in light of the realities of the lack of effective competition in pay TV, reflected in multiple previous investigations into the pay TV sector which have highlighted Sky's high and persistent retail market share, the difficulties associated with large-scale entry and expansion (including material structural barriers to entrants' ability to acquire premium sports rights), Sky's super-normal profits in downstream pay TV markets, Sky's incumbency advantages, and low levels of switching.<sup>41</sup> None of these factors are consistent with Sky being subject to intense competition in retail pay TV markets or strong downstream inter-platform competition. Indeed in its August 2012 Report the Competition Commission very clearly stated that "*competition was not effective*" in the pay TV retail market it defined.<sup>42</sup> The factors that led to this conclusion have not changed in the two years since the CC's Report.
- (ix) Moreover, based on the evidence that Sky has submitted to Ofcom, the likelihood that Sky would withhold AC services absent on-going regulation is not merely theoretical. Sky's own submissions demonstrate the hollowness of its claims that it would wish to continue to offer third party interactive/enhanced TV services on its platform absent an on-going, enforceable, obligation to do so.
- 3.2. Sky's arguments in Sky's Second Response that its platform incentives would outweigh its incentives as a broadcaster are simply not plausible. For that to be the case, it would be necessary to believe that Sky limiting access to AC services to BT hurts Sky the platform operator more than it benefits Sky the broadcaster. However, a cursory examination of Sky's incentives shows this not to be the case:
- (i) As a **platform operator**, Sky claims that it is incentivised to broaden its offering as much as possible given that it faces vigorous competition from other platforms. However, this is simply not the case in light of the advantages that Sky has as a platform operator and dominant pay TV retailer vis-a-vis other platform operators. In Sky's Second Response, Sky itself focuses on content as being the most significant factor when it comes to competition between broadcasters,<sup>43</sup> but fails to highlight that this is equally the case when it comes to competition between platform operators – the platform with the highest quality 'must have' content overall is likely to be the one chosen by most retail consumers. In this respect Sky's ownership and control of the widest range of channels that are most important to consumers (the full suite of Sky's sports channels, its movies and basics channels as well as HD and catch-up access to this content) mean that as a platform operator and pay TV

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abandoning, its proposed investments – as explained in section 5 of BT's Second Response).  
[CONFIDENTIAL]

<sup>41</sup> See Ofcom's 2010 Pay TV Statement; see also the Competition Commission's Report "*Movies on pay TV market investigation: A report on the supply and acquisition of subscription pay-TV movie rights and services*", August 2012 (the "CC Movies report").

<sup>42</sup> CC Movies Report, paragraph 20.

<sup>43</sup> Paragraph 7.14.

retailer Sky has material advantages. It is irrelevant how many alternative platforms (or routes to market) may exist, if these platforms do not have access to the full range of key content that drives consumer decision making and pay TV take-up.<sup>44</sup> As a result, Sky is better placed than the other platforms it cites (Google, Apple, Microsoft, BT YouView) to attract retail pay TV subscribers, since these other platforms do not have access to the full suite of Sky channels. Sky's incentives as a platform operator are synonymous with its incentives as a pay TV retailer and Sky remains unconstrained at the retail level. Given this, Sky's incentives as a platform operator are not driven by access to the content available to it via the enhanced TV services on the BT Sport channel. Unlike other platform operators, Sky has no need of such content in light of the overwhelming advantages it derives from ownership and control of its own key content. As such, its claims that it must have access to as wide a range of products and services as possible from third parties in order to remain competitive are not tenable. Sky's ability to retain or acquire retail pay TV subscribers will not be driven by whether or not the enhanced TV services associated with BT Sport are available on its digital satellite platform given the range of key content Sky is already able to offer relative to the majority of its pay TV rivals.

(ii) As a **broadcaster**, it is in Sky's best interests for BT Sport to be weakened to ensure the (limited) competition it currently faces is further eroded, protecting Sky's dominance at the wholesale level and its super-normal profits. There are various dimensions to Sky's incentives with respect to AC services in this regard. Limiting, withholding or withdrawing AC services (particularly in connection with critical red button services or attractive new enhanced TV services) would be likely, amongst other things to:

- [CONFIDENTIAL];
- [CONFIDENTIAL];
- [CONFIDENTIAL];
- [CONFIDENTIAL]; and
- [CONFIDENTIAL].

3.3. There are clearly significant benefits to Sky as a broadcaster and as a pay TV retailer from limiting access to AC services to BT. At the margin, this would clearly make BT Sport a less effective competitor for sports subscribers and for key sports rights. In contrast, the only way in which Sky as a platform operator is negatively affected by limiting BT's access to AC services is if this results in Sky's platform being weakened to such a degree that existing satellite subscribers would switch away (or new subscribers would choose not to become

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<sup>44</sup> In this respect Sky's reference to the recent Mediatique report for Ofcom is a red herring (Sky's Second Response paragraph 9). While the Mediatique report refers to the fact that there are multiple platforms and routes to market across a range of distribution technologies, it makes no claim as to how effective competition is between these platforms, particularly when it comes to attracting retail pay TV subscribers which is at the heart of Ofcom's analysis.

satellite customers) in order to access the enhanced BT Sport TV services not available via the digital satellite platform. Given the other inherent advantages of the Sky platform (not least, access to the full suite of Sky's sports channels) this seems implausible. Therefore, given Sky's incentives as a broadcaster and the lack of disciplining factors Sky faces as a platform operator, Ofcom's conclusion that Sky's broadcast incentives would dominate is correct.

3.4. Moreover, Sky's incentives do not alter merely because, due to exceptional circumstances, BT acquires a given set of rights: i.e. Ofcom's assessment is correct whether considered from an ex ante perspective before rights are acquired by BT Sport or ex post after BT Sport has acquired a given set of rights. Again, it is instructive to consider both sets of Sky's incentives, under these circumstances.

3.5. [CONFIDENTIAL]<sup>45</sup>

3.6. Therefore, if Sky limited BT's access to AC services, the only impact that the Sky platform would suffer would be [CONFIDENTIAL]<sup>46</sup> [CONFIDENTIAL]

3.7. In contrast, if Sky limited BT's access to AC services on Sky's digital satellite platform it [CONFIDENTIAL]:

(i) [CONFIDENTIAL]

(ii) The only way such advertising could work to BT's advantage would be if a lack of the secondary games behind the red button were likely to be so important to subscribers on Sky's platform as to induce them to switch platform away from Sky's to BT's platform:

- However, since these games would [CONFIDENTIAL] and since a sports subscriber switching away from Sky's platform to BT's platform would be required to forego access to SS3, 4, 5 and F1, this is a highly implausible outcome.
- A more realistic outcome is that BT Sport subscribers on Sky's platform would be unhappy to be missing out on these secondary games and [CONFIDENTIAL]

(iii) [CONFIDENTIAL]

3.8. [CONFIDENTIAL] Sky's platform incentives would only be likely to outweigh its broadcaster incentives if access to the secondary UEFA matches behind the red button were viewed as sufficiently essential by a significant number of subscribers such that they churned away from the Sky platform.<sup>47</sup> This is implausible given (i) [CONFIDENTIAL] and (ii) all of the other advantages that Sky has (including SS3, 4, 5 and F1) as a platform operator. It is also worth noting that if Sky creates an outcome where it is more likely to win the UEFA rights back in the future this benefits Sky the platform operator in addition to Sky the

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<sup>45</sup> It is worth noting that [CONFIDENTIAL]

<sup>46</sup> It is important to note that, under its existing UEFA contract, [CONFIDENTIAL]

<sup>47</sup> As highlighted in paragraph 2.14 above, the need to address such clash management issues could equally apply to scheduling clashes for other sporting events. [CONFIDENTIAL]

broadcaster since Sky would again have complete certainty and control over the supply of that content on its platform.

- 3.9. Overall, BT believes that it is indisputable that Sky has both the incentive and ability to limit BT's ability to compete at the margin in the event it is not required to provide regulated access to AC services. Sky has not adduced any evidence to prove the contrary.

### **The relevant threshold for intervention**

- 3.10. With respect to Ofcom's analysis on Sky's mixed incentives, Sky argues that:

*"Ofcom's assertions on this matter are based entirely on submissions by two of Sky's key rivals, the BBC and BT, and speculation."<sup>48</sup>*

- 3.11. Ofcom's analysis of Sky's mixed incentives is not based on "speculation" as Sky alleges, but rather a detailed assessment of the behaviours that a vertically integrated, scale incumbent would be likely to display when it has both the incentive and ability to limit its competitors' ability to compete at the margin. Ofcom's analysis is consistent with that of a regulator considering incentives on an ex ante basis, i.e. by assessing the balance of probabilities of detriment to the competitive process and consumers. It is unsurprising that in doing so Ofcom has had regard to BT and the BBC's evidence since these are the two parties that already make active use of Sky's AC services, and as such are the ones most likely to be affected by the removal of existing regulation.<sup>49</sup>
- 3.12. BT notes Sky's spurious attempt to suggest that regulated access to its AC services is only warranted if the ability to offer enhanced TV services "*plays a significant role in determining the success or otherwise of a premium sports channel*"<sup>50</sup> or "*is critical to bidders' likelihood of winning auctions for important sports rights in the UK*"<sup>51</sup> Indeed, Sky appears to believe that Ofcom's theory of harm justifying intervention would only be appropriate if BT was likely to abandon its investment in BT Sport entirely or significantly reduce its investment.<sup>52</sup>
- 3.13. BT agrees with Sky's proposition that competition among broadcasters of premium sports channels is driven by a range of factors.<sup>53</sup> However, unlike Sky, BT recognises that one of these factors is clearly the ability to make a channel more or less attractive to consumers (and sellers of rights) by offering enhanced TV services. Indeed, while BT focused its evidence to Ofcom on whether or not there were viable alternatives to Sky's (existing) AC

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<sup>48</sup> Paragraph 8 of Sky's Second Response.

<sup>49</sup> BT discusses the specific issues with respect to Sky's mixed incentives, and, in particular, why its broadcast incentives dominate its platform incentives above.

<sup>50</sup> Paragraph 7.2 of Sky's Second Response.

<sup>51</sup> Paragraph 7.8.1 of Sky's Second Response.

<sup>52</sup> Paragraph 7.99 of Sky's Second Response.

<sup>53</sup> Paragraph 7.14 of Sky's Second Response.

services<sup>54</sup>, Sky appears to believe that as long as any alternative exists – no matter how costly for its competitors or imperfect it may be – there is no basis for regulation of its AC services.<sup>55</sup> Yet, it is notable that Sky itself does not rely on any of the alternatives that it sets out – it uses such alternatives as complements. Moreover, if access to Sky’s AC services does not matter and plays only a “*minor role*”<sup>56</sup>, in the competitive process as Sky claims it is unclear why Sky is so determined to limit the application of its proposed commitments – particularly vis-a-vis AC services for new enhanced TV services over new Sky boxes. It is clear that Sky anticipates some competitive benefit from the removal of this regulation and, in particular, from denying access to AC services for new enhanced TV services over its new set-top-boxes.

- 3.14. The relevant consideration for Ofcom is not whether or not it may be possible for a competitor to fashion some costly and non-comparable alternative to Sky’s AC services, nor whether BT Sport would be driven out of business absent the regulated provision of Sky’s AC services. It is whether, at the margin, Sky’s behaviour would impact effective and sustainable competition such that BT’s (and other competitors’) ability to compete will be weakened by being forced to offer a lower quality/less compelling sports offering (both from a consumer perspective and from a rights seller perspective) without regulated access to Sky’s AC services.
- 3.15. Such a threshold for intervention is fully supported by other Ofcom decisions where access conditions have been imposed. For example, Ofcom’s Fixed Access Market Review (FAMR) Statement published in June 2014 makes clear that the purpose of the regulation is specifically to overcome concerns that BT (and KCOM) would have the incentive and ability to favour their own downstream retail businesses:<sup>57</sup>

*“In each of the four wholesale markets we have identified, there is a vertically integrated operator (KCOM in the Hull Area, BT in the UK excluding the Hull Area) that we have found to have SMP. In the absence of ex ante regulation, we consider that BT and KCOM would have the incentive, and their SMP would give them the ability, to favour their own downstream retail business over rivals in the relevant retail markets. This would distort competition in the relevant retail markets.”*

Ofcom highlights concerns that this could manifest in the form of restricting competition by refusing to supply access or providing access but only on less favourable terms compared to those obtained by their own business (in the form of pricing or quality discrimination).<sup>58</sup> This concern of distortion of competition is precisely the one that arises with respect to AC services. Moreover, Ofcom expressly states a concern that:

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<sup>54</sup> And did not, as Sky claims, only consider propositions that were “*perfect substitutes*” for Sky’s red button services (Paragraph 7.59 of Sky’s Second Response).

<sup>55</sup> See paragraphs 7.58 to 7.71 of Sky’s Second Response.

<sup>56</sup> Sky’s Second Response paragraph 7.18.

<sup>57</sup> See for example paragraph 8.7.

<sup>58</sup> Paragraph 8.8 FAMR.

*“Vertically integrated CPs have the ability to favour their own downstream business over third party CPs by differentiating on price or terms and conditions. One form of discrimination is in relation to the handling of requests for new forms of network access. This has the potential to distort competition at the retail level by placing third party CPs at a disadvantage compared with the downstream retail business of the vertically integrated operator in terms of their ability to introduce new services to meet their customers’ needs and in terms of their ability to offer innovative services in order to compete more effectively.”<sup>59</sup>*

3.16. Other reasons to underpin the regulation of BT in the FAMR Statement include:

- Ensuring a level playing field;<sup>60</sup>
- Ensuring stability in markets;<sup>61</sup>
- Ensuring providers in downstream markets can make effective use of the input product;<sup>62</sup> and
- Allowing CPs to innovate and differentiate their products to a greater extent.<sup>63</sup>

3.17. A similar approach can be found in Ofcom’s Statement on the Business Connectivity Market Review (BCMR).<sup>64</sup> Ofcom notes that its decisions in the BCMR are designed to:

*“promote competition in the provision of leased lines and the services which use them, and will affect the availability, choice, price, quality and value for money of data-transfer services throughout the UK. They are therefore important in furthering the interests of citizens and consumers.”<sup>65</sup>*

3.18. There is therefore no suggestion of anything approaching the substantially higher threshold for regulatory intervention that Sky has advocated, namely that a competitor would need to be driven out of business absent regulation. It is clear then, that the threshold that Sky seeks to apply with respect to the regulation of AC services is wholly inappropriate and inconsistent with Ofcom’s approach to setting access conditions in other cases.

#### **4. DEFICIENCIES WITH SKY’S COMMITMENTS**

4.1. In its response to Ofcom’s consultation document, BT set out in detail the deficiencies in Sky’s proposed commitments, and explained how Ofcom’s draft conditions addressed

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<sup>59</sup> Paragraph 10.88 FAMR.

<sup>60</sup> Paragraph 10.151 FAMR.

<sup>61</sup> Paragraph 10.231 FAMR.

<sup>62</sup> Paragraph 10.239 FAMR.

<sup>63</sup> Paragraph 14.5 FAMR.

<sup>64</sup> Business Connectivity Market Review – final statement published 28 March 2013.

<sup>65</sup> Paragraph 1.4 BCMR.

these deficiencies. In summary, the material deficiencies with Sky's commitments include the following: (i) they do not cover new enhanced TV services over new Sky set top boxes, (ii) they leave questions of interpretation to Sky's discretion and (iii) they are unenforceable.

- 4.2. In section 10 of Sky's Second Response, Sky attempts to explain why certain of the shortcomings that Ofcom has identified with Sky's proposed commitments either do not arise or are addressed by the latest round of modifications that Sky has made to its proposed commitments. Sky does not, however, make any attempt to address Ofcom's observation that:

*"... if a third party wished to develop an entirely new interactive service (i.e. this service was not included in the list of services in Sky's proposed commitments) on a new generation of STB, it would not be covered by the proposed commitments".<sup>66</sup>*

- 4.3. As BT has noted in BT's Second Response, this issue is key to the inadequacy of Sky's proposed commitments.<sup>67</sup> It is notable, but not surprising for the reasons BT has previously explained in BT's Second Response, that Sky has not made any attempt to address it.<sup>68</sup>

- 4.4. In addition to failing even to consider the key issue of new enhanced TV services over new STBs, Sky seeks summarily to dismiss the issue of enforcement. Sky makes four points on this issue:

- (i) Sky would suffer reputational damage if it were to renege on its commitments;
- (ii) Ofcom could introduce new regulation;
- (iii) Ofcom has previously accepted unenforceable commitments from BT; and
- (iv) Sky has an "*unblemished compliance record in relation to the provision of AC services*".<sup>69</sup>

- 4.5. In BT's Second Response, BT has already addressed Sky's implausible claims in respect of reputational damage if it does not comply with its unenforceable commitments.<sup>70</sup> BT has also explained that it is not correct to think of this issue just in binary terms – i.e. that Sky either complies with the commitments or it does not. In practice, as there is ample scope for Sky to interpret its unenforceable commitments in a way that prevents, restricts or distorts competition, Sky would not have to renege on its commitments in order to impede fair and effective competition<sup>71</sup>.

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<sup>66</sup> Paragraph 5.11.2 of the Consultation Document.

<sup>67</sup> See paragraphs 4.3 to 4.29 of BT's Second Response.

<sup>68</sup> See paragraphs 4.23 to 4.28 *ibid*.

<sup>69</sup> Paragraph 10.4 of Sky's Second Response.

<sup>70</sup> Paragraphs 4.63 to 4.66 of BT's Second Response.

<sup>71</sup> Paragraphs 4.67 to 4.74 of BT's Second Response.

- 4.6. With regard to Sky's claim that Ofcom could reimpose conditions at any point in the future if Sky does not comply with its proposed commitments, in this scenario Ofcom would need to gather evidence that Sky's commitments were not effective (having previously concluded from the current consultation process that they would be adequate) and then consult on the introduction of new conditions. Noting the duration of the present consultation process, it seems highly probable that any future evidence gathering would not be completed quickly. In the meantime, Sky would be able to exploit that ineffectiveness of its commitments. In the circumstances, Ofcom cannot attach weight to the possibility of subsequently reintroducing AC regulation when comparing the relative merits of (i) Sky's proposed commitments and (ii) the introduction of new AC conditions at this stage.
- 4.7. As for Sky's claim that Ofcom has previously accepted unenforceable undertakings from BT "*in similar circumstances on three occasions previously*",<sup>72</sup> Sky has mischaracterised the nature of these commitments and the circumstances in which they were offered to Ofcom. Sky originally referred in its submission of 19 September 2013 to four examples of non-legally binding undertakings that BT had offered to Ofcom following the removal of Continuation Notices:
- (i) In May 2004 in relation to charges for number portability standards services;
  - (ii) In May 2004 in relation to non-conveyance elements of a Public Emergency Call Service;
  - (iii) In November 2004 in relation to rental prices for hardwired phones; and
  - (iv) In February 2005 in relation to payphone access charges.
- 4.8. As BT explained to Ofcom in its "*Brief commentary on Sky's response to Ofcom's AC Review*",<sup>73</sup> the way in which Ofcom approached the removal of the four Continuation Notices cited above in respect of BT does not create a precedent which would justify Ofcom shying away from imposing access control conditions.<sup>74</sup>
- 4.9. For all the reasons explained by BT to Ofcom in this access control consultation, Sky has the ability and incentive materially to limit competition from third party broadcasters/pay TV retailers by affecting the quality of TV and TV-related services provided over its platform.<sup>75</sup> In contrast, in the examples cited by Sky, there is no suggestion that BT had the intention or ability to restrict competition (this is self-evident in the case of public emergency calls, rental prices for hard-wired phones and payphone access charges). Sky's suggestion that these previous examples of commitments amount to "*similar circumstances*" is simply not correct.

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<sup>72</sup> Sky's Second Response, paragraph 1.

<sup>73</sup> Provided to Ofcom on 17 November 2013.

<sup>74</sup> Paragraph 21.

<sup>75</sup> See paragraph 3.1; see also BT's Second Response, paragraphs 3.7 to 3.14.

- 4.10. Finally, when considering whether to accept Sky's proposed commitments rather than introduce new AC regulation, it is clear that Ofcom should not attach any weight to Sky's claim that it has an "*unblemished compliance record in relation to the provision of AC services*". This is because, to date, Sky has been subject to enforceable AC regulation. Even if Sky has complied with its legal obligations under the enforceable AC regulatory regime to date, that does not provide any evidence of how Sky will behave in the absence of enforceable AC regulation. It is logically fallacious for Sky to argue otherwise.
- 4.11. In the circumstances, it is clear that Sky's attempts summarily to dismiss the material concerns that have been raised with its proposed commitments are without merit.

**5. SKY'S LATEST AMENDMENTS TO THE COMMITMENTS DO NOT ADDRESS THESE FUNDAMENTAL DEFICIENCIES**

- 5.1. BT notes that Sky has put forward further amendments to its proposed commitments in its latest response. However, it is self-evident that no changes that Sky can propose to its unenforceable commitments would turn them into binding obligations that could be enforced by Ofcom. In a similar vein, none of the changes that Sky has proposed to its unenforceable commitments would have the effect of removing from Sky's discretion all questions over the interpretation of the commitments. In addition, as noted in section 4 above, Sky has not made any attempt to address the key shortcoming that its proposed commitments do not cover new enhanced TV services over new boxes. Therefore, as noted in section 4 above, the very material shortcomings with Sky's commitments all remain in place despite Sky's latest round of changes.
- 5.2. Despite this, in section 10 of Sky's Response, Sky seeks to make great play of certain new changes that it has proposed to its commitments. For the reasons explained in the following paragraphs, the benefits that would flow from these changes are, at best, limited.
- 5.3. In paragraph 10.5.2 of its Response Sky claims that it would address the lack of certainty over the contractual terms that it would make available under the commitments by allowing third parties to include in their existing contracts a right of renewal for a further three years on the same terms. Despite this change, Sky still reserves the right to vary the terms of any new AC agreement with "*reasonable justification*", the interpretation of which expression would be subject to Sky's discretion. Thus the certainty that Sky claims would not arise.
- 5.4. In paragraphs 10.5.16, Sky claims that it has some flexibility to interpret what it considers to be "*reasonable*" under the conditions. Hence Sky claims that the level of uncertainty over such interpretation under the commitments "*would be no greater*" than the uncertainty under the conditions. This claim is, however, clearly incorrect because under the conditions, but not the commitments, the question of what is reasonable would ultimately be for Ofcom to determine not Sky. Thus under the conditions, but not the commitments, third parties would know that an independent regulator (which is subject to statutory duties to promote competition among other things) would ultimately determine such issues in accordance with its published guidance. Hence the level of uncertainty and the risk of an interpretation which is adverse to effective competition is very real under the commitments but not under the conditions.

- 5.5. In paragraph 10.5.7, Sky claims that the issue of uncertainty under the commitments will be further reduced by its change to ensure that its initial standard terms and conditions will be established at a specific date to be agreed with Ofcom. Nevertheless, at present whilst the commitments are being evaluated against the conditions, the contents of Sky's future standard terms and conditions remains uncertain.
- 5.6. Finally with regard to the new changes that Sky has made to its proposed commitments, in paragraph 10.5.5 Sky claims that it will include a requirement in the commitments to provide AC services on terms that are not unduly discriminatory. Yet, in its consultation Response Sky has deleted paragraph 3.3 from Ofcom's draft conditions – that paragraph would require Sky to publish a reference offer for third parties of the 'terms' on which Sky provides AC services to itself. In practice, condition 3.3 would be the principal mechanism by which the conditions would ensure that Sky does not discriminate in its own favour. Given that Sky has proposed the deletion of paragraph 3.3 from the conditions, it is clear that Sky would not be willing to let third parties know what AC services it is providing to itself and the 'terms' of such provision. Hence Sky's offer not to discriminate unduly under the commitments is clearly hollow and one can infer that Sky intends to interpret this provision in a way that any discrimination between the AC services that Sky provides to itself and the AC services that Sky provides to third parties is not "undue". In practice, Sky may simply claim that by providing AC services to itself, but not to third parties, for new enhanced TV services over new boxes, Sky is not engaging in "undue discrimination". In such a situation, Ofcom and the third parties would have no remedy.
- 5.7. In the circumstances, it is clear that:
- (i) Sky's most recent changes to its proposed commitments do not address the most fundamental shortcomings with the commitments; and
  - (ii) These most recent changes only marginally address some of the other shortcomings with the commitments and certainly do not result in the improvements that Sky has claimed in its Response.

## **6. ASSESSING THE DRAFT CONDITIONS AGAINST THE RELEVANT COUNTERFACTUAL**

- 6.1. Sky states that:

*"Any consideration of the necessity of regulation must occur against a counterfactual: what would happen, or is likely to happen, absent that regulation.*

and

*"In the current case, Ofcom must assess the need for regulation against the following facts: absent formal regulation, Sky would be operating under the Commitments it has offered to Ofcom – potentially amended to address some of the concerns now expressed by Ofcom in the Consultation..."<sup>76</sup>*

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<sup>76</sup> Sky's Second Response, paragraphs 5.1-5.2.

- 6.2. BT agrees that the correct counterfactual for considering the need for Ofcom's draft conditions is Sky's proposed commitments, and not a complete absence of any measures in respect of AC. This is, in fact, the counterfactual adopted by BT in its response to Ofcom's recent consultation.
- 6.3. However, despite Sky's insistence on a consideration of the appropriate counterfactual, Sky fails to acknowledge that if Sky's proposed commitments are the correct counterfactual then all but one of Sky's objections to the draft conditions disappear. For example:
- (i) Sky argues that regulation under the draft conditions would be burdensome because it causes Sky to incur costs and to undertake additional administrative activity by virtue of allowing onto its platform third party applications which need to be tested. But if the counterfactual is Sky's own proposed commitments and if Sky intends to comply with those commitments then, even in the absence of the new conditions, Sky would be willing to allow onto its platform third party applications which need to be tested. Hence the conditions do not give rise to an additional burden (unless, of course, Sky intends to renege on its commitments or to interpret its obligations under its commitments in such a way as to limit access to AC services for third parties).
  - (ii) Sky also argues that the draft conditions are 'intrusive' because they dictate with whom Sky must do business. But, again, if Sky's proposed commitments are the appropriate counterfactual and if Sky intend to comply with those commitments then, even in the absence of the new conditions, Sky would already be committed to doing business with the same third parties. Hence the conditions do not restrict Sky's freedom in this respect (unless Sky intends to renege on its commitments or to interpret its obligations under its commitments in such a way as to limit access to AC services for third parties).
- 6.4. In practice, the only area where Ofcom's draft conditions restrict Sky's freedom beyond its own proposed commitments is in requiring Sky to permit new enhanced TV services over new boxes. Sky argues that this will reduce its incentive to innovate.
- 6.5. However, as BT has already explained,<sup>77</sup> notwithstanding Sky's vague claims about its alleged reluctance to develop new set top box functionality, Sky has invested in and developed such functionality. Indeed, Sky has consistently produced new generations of set top boxes with updated features and functionality over the least 15 years. In addition, it has been widely reported that Sky is well advanced in its development of its "Project Ethan" set top box, which will contain a new more advanced middleware, notwithstanding the existing AC regulatory regime.
- 6.6. Moreover, Sky's own retail pay TV business would be by far the biggest beneficiary of any new functionality that Sky introduces to its set top boxes. So Sky's suggestion, that it would forebear from introducing such new functionality if it were required to offer third parties FRND access to that new functionality, is commercially irrational.

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<sup>77</sup> Paragraphs 5.26 to 5.32 of BT's Second Response.

6.7. As Ofcom noted in its consultation document, the draft conditions would enable Sky to invest and innovate<sup>78</sup> and would not produce adverse effects for Sky.<sup>79</sup>

6.8. Sky also asserts that:

*“If the arguments for and against [the imposition of regulation] are, as Ofcom states, “finely balanced”, Ofcom should forbear from regulation. Ofcom’s stated principle of acting with “a bias against intervention” reinforces the fact that forbearance from regulation is appropriate if the arguments for and against it are considered to be “finely balanced.””<sup>80</sup>*

6.9. However, this is simply incorrect. Ofcom’s policy principle of acting with a bias against intervention does not mean that it can opt out of its statutory duty to further the interests of consumers in relevant markets, where appropriate by promoting competition. It merely means that where Ofcom is entirely satisfied that regulation is not necessary to preserve the competitive process then it should act to remove that regulation. If Ofcom is not certain that Sky’s proposed commitments can fully address the concerns identified – and it is clear from its consultation that this is the case – then Ofcom has a duty to ensure that adequate protections remain in place in this case through (enforceable) regulatory conditions.

6.10. Moreover, for the reasons set out in sections 2 to Section 4 of BT’s response to Ofcom’s second consultation, the assessment of the proposed commitments against the draft conditions is not, in fact, finely balanced.

## **7. SKY’S PROPOSED AMENDMENTS TO THE CONDITIONS ARE WHOLLY INAPPROPRIATE**

7.1. In its response, Sky has proposed extensive amendments to Ofcom’s draft conditions. Although BT has material concerns with almost all of these proposed amendments, in this commentary BT has focused only on the major changes proposed by Sky. By examining these major changes it is clear what Sky’s true motivations and intentions are with respect to the on-going provision of AC services, since Sky’s proposed changes to the conditions are designed to utterly neuter them to a point where the draft conditions would be even less effective than Sky’s (materially deficient) proposed commitments.

7.2. The three major changes that Sky proposes to the draft conditions are designed:

- (i) to narrow the scope of the conditions;
- (ii) to permit Sky to discriminate in favour of itself; and
- (ii) to remove all enforcement provisions

7.3. Below BT assesses each of these in turn

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<sup>78</sup> AC Consultation Document paragraph 7.134.

<sup>79</sup> AC Consultation Document paragraph 7.109.

<sup>80</sup> Sky’s Second Response, paragraph 3.6.

### **Narrowing the scope of the conditions**

- 7.4. As amended by Sky, the draft conditions would no longer cover new enhanced TV services over new boxes as Ofcom intended. This is because the effect of Sky's amendments is to define Access Control Services by reference to a prescribed list of downstream enhanced TV services. By limiting the range of enhanced TV services to those that are currently available over existing set top boxes, Sky's amendments have narrowed the scope of the conditions so that they no longer cover new enhanced TV services over new Sky set top boxes.
- 7.5. Furthermore, as a result of Sky defining AC services in the amended conditions by reference to a list of current enhanced TV services, the amended conditions would actually be narrower in scope than Sky's proposed commitments. This is because the draft conditions do not distinguish between current and new Sky set top boxes – so the limitation of AC Services to current enhanced TV services would not just apply to new Sky set top boxes, it would also apply to Sky's current boxes. Yet, under Sky's proposed commitments, Sky would offer AC services for new enhanced TV services over its current boxes. By attempting to make Ofcom's draft conditions narrower in scope than its own proposed commitments, Sky has clearly demonstrated the unreasonable and inappropriate nature of its amendments to Ofcom's draft conditions.

### **Permitting Sky to discriminate in favour of itself**

- 7.6. In its proposed amendments to the draft conditions, Sky has deleted condition 3.3 which would prevent Sky from discriminating in favour of its own business. The only reason for objecting to condition 3.3 is if Sky intends to offer more favourable terms to its own broadcasting and retail pay TV businesses than to third party broadcasters and pay TV operators. By deleting this condition, Sky's true incentives and objectives are revealed.

### **Removing all enforcement provisions**

- 7.7. In its proposed amendments to the draft conditions Sky has deleted all the standard enforcement provisions including conditions 1.4, 2.1(c), 2.3, 3.10 and 3.11. As highlighted above, one of the primary deficiencies with Sky's proposed commitments is their lack of enforceability, a deficiency which would, of course, not have arisen under the draft conditions on which Ofcom consulted.
- 7.8. By excising all enforcement conditions, again, Sky's true incentives and objectives are revealed: it is clear that if Ofcom imposes the new conditions, Sky will nevertheless seek to ignore Ofcom so far as is possible. Given Sky's strong desire to avoid regulatory oversight it is difficult to accept its assertions that a lack of enforcement mechanism in its proposed commitments would not be problematic.

### **Sky's purported justifications for its amendments to the draft conditions are without merit**

- 7.9. Sky puts forward various arguments to justify its amendments to the draft conditions. However, these arguments are without merit.
- 7.10. Sky argues that the draft conditions are too broad and capture services that Ofcom's consultation document says should not be covered. This is not the case. Ofcom was clear that services that could be considered to be enhanced TV services – even if they might also

be considered to fall into another category of AC services – should be covered under the conditions. BT believes this is the correct approach to ensure consistent, clear regulation going forward and to avoid the risk of Sky regulatory gaming.<sup>81</sup> As such, the draft conditions are no broader than required.

- 7.11. Sky also argues that the draft conditions go beyond the scope of existing regulation under continuation notices. This is not correct. The current AC Continuation Notice covers AC services for all enhanced and interactive TV services, including stand-alone interactive TV services such as email via the TV, over all Sky set-top boxes. In contrast, Ofcom’s new draft conditions only cover AC services for all enhanced TV services over all Sky set-top boxes. Thus it is clear that the scope of the latter is narrower than the scope of the former.
- 7.12. Sky argues that the draft conditions reintroduce the lack of clarity inherent in the existing AC regime which Sky was seeking to have addressed. This is not the case. Firstly, BT has set out in detail why Sky’s claims about the impact of AC regulation on its investment incentives and incentives to innovate are over-stated.<sup>82</sup> Secondly, on any objective assessment it is clear that the text in Ofcom’s new draft conditions is substantially clearer and reflects far more accurately the actual services in question than the text in the current Continuation Notice. In practice the lack of clarity that Sky alleges simply doesn’t arise. The mere fact that ex ante regulation is, by definition, forward looking and therefore seeks to anticipate future developments does not mean that the regulation is unclear.

## **8. SKY’S LEGAL ANALYSIS IS FLAWED**

- 8.1. Ofcom’s proposed approach in the consultation in relation to the draft conditions is correct and falls squarely within Ofcom’s powers to impose access control conditions under sections 73 to 74 of the Communications Act 2003 and Article 5(1) of the Access Directive.
- 8.2. In this regard, Sky’s legal assessment in Annex 1 of the Sky Response is flawed. Sky argues that – on the basis of a narrow construction of Article 5(1) – Sky’s AC services are not in general necessary to provide “television broadcasting services” such that they fall outside Ofcom’s powers. This is wrong and mischaracterises the relevant legislation.
- 8.3. BT addresses Sky’s arguments in turn below.

### **Ofcom is entitled to impose access conditions outside the SMP regime**

- 8.4. In the Access Directive, Article 8 draws a distinction between the imposition of access-related conditions in SMP markets (Articles 9 to 13A) and in a non-SMP context (Article 5(1)). Ofcom is only required to conduct an SMP market review and reach an SMP finding before imposing access conditions when using its powers under Articles 9 to 13A. This distinction is mirrored in the provisions of the Communications Act – implementing the Access Directive. In particular, sections 73 to 74 of the Communications Act clarify the circumstances in which a section 45 access condition can be imposed outside the SMP regime.

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<sup>81</sup> See paragraphs 2.40 to 2.42 of BT’s Second Response.

<sup>82</sup> See paragraphs 5.23 to 5.32 of BT’s Second Response.

- 8.5. Ofcom has the power to impose access control conditions without a prior finding of SMP: entirely separately from the regime for SMP access conditions. Ofcom can and should exercise that power where new access conditions are needed to ensure access to enhanced TV services.
- 8.6. Sky also accepts in principle Ofcom's powers in this respect when it concludes that:

*"On the narrow construction outlined above, Article 5(1), Access Directive permits Ofcom to impose an ex ante obligation on Sky to provide FRAND access to APIs only "to the extent that is **necessary to ensure accessibility for end-users to digital radio and television broadcasting services** specified by the Member State" (emphasis added): see Article 5(1)(b)."*<sup>83</sup>

### **The interpretation of the CRF regime and Article 5(1)**

- 8.7. Sky dedicates a large portion of its legal annex to assessing the scheme of the EU common regulatory framework for electronic communications (the "CRF") and providing the backdrop to its argument that Article 5(1) should be interpreted narrowly. For example, Sky argues that the scheme of the CRF (i) is "permissive" [of operators' commercial freedom], (ii) allows "unfettered commercial negotiation", and (iii) that access related obligations "fall to be interpreted strictly".
- 8.8. However narrowly Article 5(1) of the Access Directive is construed, and even absent SMP, it is clear that, in the present case, there is a compelling case to impose new conditions on Sky, which are "*necessary to is necessary to ensure accessibility for end-users to digital radio and television broadcasting services specified by the Member State [...]*" under Article 5(1).

### **Access conditions are necessary**

- 8.9. Having laid the groundwork for its view that Article 5(1)(b) should be interpreted narrowly, Sky goes on to contend that its own "*AC services are not in general necessary to provide 'television broadcasting services' to end users.*"<sup>84</sup>
- 8.10. Sky's reasoning here is specious in a number of respects.
- 8.11. First, Ofcom's approach in the AC Conditions is not to regulate Sky's AC services "in general". Rather, Ofcom has rightly sought to impose regulation only where necessary in respect of specific Sky AC services. In this respect, Ofcom's approach is entirely consistent with its duty in section 47 of the Communications Act to impose access conditions only where objectively justifiable, not unduly discriminatory, proportionate and transparent.<sup>85</sup>
- 8.12. Ancillary broadcasting services such as red button or commercial watermarking services – which Ofcom has shown in its consultation to be essential in supporting the delivery of enhanced TV services – fall naturally within the definition of "television broadcasting

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<sup>83</sup> Sky's Second Response, paragraph 4.5.

<sup>84</sup> Emphasis added.

<sup>85</sup> As BT observed in BT's Second Response, Ofcom has satisfied the test laid out in section 47.

services.” Currently, the most important of these services – which Sky has not addressed in Sky’s Second Response – are red button services to enable multiple video streams for clash management. BT has already explained that it would be at a direct disadvantage when bidding for sports rights, if FRND access to Sky’s red button functionality were not assured.<sup>86</sup> [CONFIDENTIAL]

- 8.13. Second, Sky artificially limits the scope of Article 5(1)(b) to the provision of AC services relating to “television broadcasting” based on a definition that Sky borrows from separate legislation (namely, the AVMS Directive). Sky argues that its own authentication and application signing services are not caught on such a narrow construction. Sky ignores alternative definitions in in the Communications Act which would include in the definition of “television broadcasting services” the transmission of, for example, the pint glass watermark in the context of commercial watermarking. The concept of “television broadcasting services” is broadly and variously defined in section 362<sup>87</sup> of the Communications Act as a service for the provision of “television programmes.” Television programmes are, in turn, defined in section 405<sup>88</sup> as including not only conventional scheduled programming but also “*moving or still images or of legible text or of a combination of those things.*” The broadcasting of the pint glass symbol to commercial premises is therefore clearly caught by this definition and so falls within the scope of Article 5(1)(b). BT notes, in this respect, that Sky’s approach to statutory interpretation is not even internally consistent: in Sky’s amendments to the access conditions, Sky specifically draws on the definition of “television broadcasting service” as set out section 362 of the Communications Act (and no mention is made of AVMS).<sup>89</sup>
- 8.14. In conclusion, Ofcom’s approach to the proposed access conditions is entirely correct. Ofcom should look beyond the overly narrow interpretation that Sky has proffered in relation to Article 5(1), the wider CRF and the Communications Act. Ofcom can impose access control conditions outside the scope of an SMP regime on AC services which are necessary to ensure delivery of television broadcasting services. Ofcom has identified specific Sky AC services – consistent with its duty in section 47 of the Communications Act

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<sup>86</sup> BT’s Second Response, paragraph 2.11.

<sup>87</sup> Section 362:

“television broadcasting service” means (subject to subsection (4)) a service which—

(a) consists in a service of television programmes provided with a view to its being broadcast (whether in digital or in analogue form);

(b) is provided so as to be available for reception by members of the public;

[...]

“television programme service” means any of the following—

(a) a television broadcasting service;”

<sup>88</sup> Section 405:

“programme” includes an advertisement and, in relation to a service, anything included in that service.”

[...]

“television programme” means any programme (with or without sounds) which—

(a) is produced wholly or partly to be seen on television; and

(b) consists of moving or still images or of legible text or of a combination of those things.”

<sup>89</sup> Sky’s Second Response, Annex 4a, page 3.

– which are essential for the delivery of current and future enhanced TV services. Therefore, there is a need for regulation and the access conditions are an appropriate and justified use of Ofcom's powers.

**BT**

**November 2014**